IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

David Blockowicz, Mary Blockowicz, and Lisa Blockowicz, individuals, Plaintiffs, v. Joseph David Williams and Michelle Ramey, individuals, Defendants.	Civil Action 1:09-cv-03955 Judge Holderman Magistrate Judge Cox

NON-PARTY XCENTRIC VENTURES, LLC'S RESPONSE TO MOTION FOR THIRD PARTY ENFORCEMENT OF INJUNCTION

Non-party XCENTRIC VENTURES, LLC ("Xcentric"), appearing through counsel undersigned[1], respectfully submits its Response to Plaintiffs' Motion For Third Party Enforcement of Injunction. For the reasons explained herein, Plaintiffs' motion is factually and legally groundless and should be denied.

I. INTRODUCTION

This matter presents serious issues of fact and law which are vastly different from what Plaintiffs have represented to this Court. Using a sports analogy, Plaintiffs have taken the field alone, played the game without any other team present, declared themselves the winners, and *then* provided notice of the outcome to the 'losing' team insisting the result is binding upon them. This procedure (or lack thereof) violates the Due Process clause of the United States Constitution. The procedure is clearly not permitted by the Federal Rules of

[1] Xcentric contests that the Court has personal jurisdiction over it and does not waive any arguments it has pursuant to Fed. R. Civ. P. 12(b)(2).

Civil Procedure and the requested outcome violates the Communications Decency Act, 47 U.S.C. § 230(c)(1).

In addition, the Plaintiffs have also presented this Court with facts which are incomplete and inaccurate. The result of this conduct is that the Plaintiffs have obtained an *ex parte* default injunction requiring the censorship of: 1.) true speech, 2.) non-actionable opinions, 3.) speech which is not about the Plaintiffs, and 4.) speech which is non-actionable because it was posted online more than six years ago and *never changed*—far beyond the 1-year statute of limitations application to defamation claims.

II. BACKGROUND

a. History of www.RipoffReport.com

Xcentric Ventures operates the website www.RipoffReport.com which was founded in 1998. Serving as a forum for speech concerning bad business practices, the Ripoff Report is the leading complaint reporting website on the Internet and one of the most ardent supporters of free speech anywhere. Over the years, Xcentric has worked closely with all levels of federal, state, and local law enforcement, including, but not limited to, various state attorneys general and county attorneys, the FBI, and local police, providing them with information used to detect patterns of deceptive business practices and to prosecute violations of consumer protection laws, among other things.

Ripoff Report is an immensely popular and powerful tool for compiling, indexing, and communicating information (in postings referred to as "reports") concerning businesses and individuals to and from consumers and the public. Some reports contain relatively tame reviews of a business, product, service, while other reports may be focused on a specific individual's conduct, and anything in between. The service is 100% free to use—it charges nothing whatsoever to users who create reports, nothing to viewers who read reports, and nothing to anyone wishing to respond to reports.

As of November 2009, the Ripoff Report contains nearly 500,000 unique reports. When expanded to include comments to reports (known as "rebuttals") the site contains millions of unique posts with up to 1,000 new submittals each day.

Given this massive volume of information and the nature of the content, it is not surprising that Ripoff Report is often sued, most commonly for defamation or related claims. The same is true of virtually all websites which allow access to third-party postings such as America Online/AOL, eBay, MySpace, and Craigslist.

However, when a case is based on statements created by a third party, claims against such websites have always failed because the Communications Decency Act, 47 U.S.C. § 230(c)(1) (the "CDA") prohibits treating website hosts as the "publisher" of any information from a third party. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Gentry v. eBay, Inc*., 99 Cal.App.4th 816, 121 Cal.Rptr.2d 703, 717–18 (2002); *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008); *Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

The CDA has been uniformly interpreted as protecting the operation of Ripoff Report. *See GW Equity v. Xcentric Ventures, LLC*, 2009 WL 62173 (N.D.Tex. 2009) (finding Ripoff Report protected by CDA and granting summary judgment in favor of Xcentric as to all claims including injunctive relief); *Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, 2008 WL 450095 (M.D.Fla. 2008) (same); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F.Supp.2d 929 (D.Ariz. 2008) (same).

Unable to avoid the CDA's effects, some Plaintiffs have fabricated claims accusing Xcentric of "extortion" in various forms. Such groundless claims have always failed for lack of proof and/or they have been found wholly irrelevant to the application of the CDA. *See GW Equity*, *supra*, at *13 (finding Xcentric's alleged business activities were irrelevant to the CDA analysis); *Global Royalties*, 544 F.Supp.2d at 932–33 (noting, "it is legally… beside the point whether defendants refuse to remove the material, or how they might use it to their advantage. Through the CDA, Congress granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.")

b. History of Current Dispute

This case involves a combination of both old and new tactics. In terms of old tactics, ¶10 of the Complaint alleges "On information and belief, <Ripoffreport.com> often attempts to charge individuals and companies money if they wish to respond to 'reports'". This is a blatantly false allegation, offered in the hopes of swaying this Court into prejudging Xcentric as an entity undeserving of fair treatment.

This case also involves a *new* approach to avoid the CDA—the plaintiffs filed suit against Mr. Williams and Ms. Ramey who have never been personally served and who defaulted.[2] Following the default and accepting all of Plaintiffs' representations as true, this Court issued an injunction (Doc. #19; 10/16/2009) which required the Defendants to remove their statements from anywhere they appear.

[2] The default occurred after the Plaintiff made a single unsuccessful attempt at service on Mr. Williams and Ms. Ramey at a rented mailbox store and via email.

But the injunction, drafted by Plaintiffs, does not stop there; it further purports to *bind every website* to the requirements imposed against the Defendants; "Plaintiffs' counsel may directly contact the third party hosts of their websites, who shall make reasonable efforts to ensure the false statements are removed … ." (emphasis added).

After the injunction was issued, Plaintiff's counsel contacted Xcentric and demanded the removal of three reports: #445743, 70642, and 69190. Xcentric declined, resulting in this motion seeking to "enforce" the injunction against Xcentric despite the fact that Xcentric is not a party and is not acting in concert with anyone who is a party. As explained below, the relief requested by the plaintiffs constitutes an assault upon the First Amendment and upon Xcentric's right to due process of law.

III. ARGUMENT

a. Plaintiffs' Motion Is Procedurally Improper

The issues contained in Plaintiffs' motion (e.g., whether Xcentric is acting "in active concert" with any enjoined party) present contested factual matters which cannot be resolved without an evidentiary hearing. *See, e.g., Rockwell Graphic Systems, Inc. v. Dev Industries, Inc.*, 91 F.3d 914, 920–21 (7th Cir. 1996) (finding where plaintiff sought to enforce injunction against non-parties, and genuine material factual dispute existed as to whether allegation was true, due process prohibited district court from resolving factual matters on the pleadings without a hearing). As such, while the Court should deny Plaintiffs' motion outright, if it does not, it must allow discovery and hold a hearing to resolve factual disputes.

b. Because Defendants Are Not Violating The Injunction, Xcentric Cannot Be "In Active Concert" With Defendants

In narrow situations, Fed. R. Civ. P 65 permits a lawfully-entered injunction to be enforced against non-parties. Plaintiffs argue that "[h]aving now received notice of the defamatory nature of Defendants' comments, Xcentric's failure to remove these defamatory statements constitutes active concert and participation for purposes of Rule 65." Mot. at 6. As explained herein, this argument is factually incorrect because Xcentric is *not* in concert with any party.

However, even if Xcentric *was* aiding Defendants, the Court must still deny Plaintiffs' motion. Under Rule 65(d)(2)(A), injunctions are not binding on anyone—even on a party—unless the enjoined party first has *actual notice* of the injunction. *See* Fed. R. Civ. Rule 65(d)(2). Here, Plaintiffs offer no evidence showing that Defendants Williams or Ramey have ever received "actual notice" of the injunction as required by Rule 65(d)(2)(A) or that the plaintiffs have even attempted to provide such notice.

As explained by the Seventh Circuit in *Herrlein v. Kanakis*, 526 F.2d 252 (7th Cir. 1975), these facts are fatal to the current motion. Absent a showing that Mr. Williams and/or Ms. Ramey are violating the injunction (which would be impossible since they have never received notice of it), it is a legal impossibility to find that Xcentric is acting "in concert" to violate the injunction with Defendants under Rule 65(d) because no such violation has occurred.

In *Herrlein,* the plaintiff owned a trade secret in a recipe for animal feed and obtained an injunction against two defendants. *See Herrlein*, 526 F.2d at 252. The plaintiff then moved the district court for an order holding a Mogul, a third party in contempt of the injunction. After a hearing, the court found that Mogul was subject to the injunction and was in contempt for its continued sales of the animal feed. *See id.* On appeal the Seventh Circuit *reversed*, holding that the district court lacked authority to enforce the injunction against Mogul in this posture. In reaching that conclusion, the Seventh Circuit adopted the sage words of Judge Learned Hand from his classic decision in *Alemite Mfg. Corp. v. Staff*:

> (N)o court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service, and who therefore can have their day in court. Thus, the only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.

Herrlein, 526 F.2d at 254 (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832–33 (2nd Cir. 1930) (emphasis added). Based on this logic, and noting that the defendants were not violating the injunction because they were not selling the feed (only Mogul was), the Court found that Rule 65(d) simply does not permit an injunction to be enforced against a non-party under a "aiding and abetting" theory when the named parties are not actually violating the injunction; "Since [defendants were not] found in violation of the order, Mogul cannot be held liable [under Rule 65(d)] as an aider or abettor of the named parties in violating the injunction." *Herrlein*, 526 F.2d at 244 (emphasis added) (citing *Garrigan v. United States*, 163 F. 16, 23 (7th Cir. 1908).

Likewise, the "aiding and abetting" theory presented by Plaintiffs simply does not apply where the named party is *not* violating the injunction, and thus there is no violation for the third party to assist: "a person, other than a named party to an injunction, may be bound by the terms of the injunction *only if the named party has also violated the terms of the injunction*, regardless of whether the person appears to have acted in concert or participation with the enjoined party." Ronald I. Mirvis, Annotation, *Who, under Rule 65(d) of Federal Rules of Civil Procedure, are persons "in active concert or participation" with parties to action so as to be bound by order granting injunction*, 61 A.L.R.Fed 482, §4 (1983) (citing extensive case law for premise) (emphasis added).

Here, because the plaintiffs have never bothered to provide the enjoined Defendants with actual notice of the injunction as required under Rule 65(d), the defendants (Mr. Williams and Ms. Ramey) are clearly not violating the injunction because they are not bound by it (at least not yet).

What is really happening is this—Plaintiffs are simply trying to substitute Xcentric into the shoes of these Defendants despite the fact that Xcentric was not, and is not, a party to this case and has never had any opportunity to defend this case on the merits.

The *Herrlein* Court considered exactly the same scenario and expressly rejected it:

> The injunction was an attempt to obtain satisfaction of that judgment by binding a person not a party to the suit. This is antithetical to the primary axiom of our jurisprudence that no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him.

Herrlein, 526 F.2d at 255 (emphasis added). For these reasons, the Seventh Circuit concluded that the injunction entered against the defendants could not be "transferred" to Mogul and then enforced against it, and reversed the contempt finding against Mogul.

Plaintiffs are attempting to do *exactly* what the *Herrlein* Court refused to allow—Plaintiffs are seeking an order which independently forces Xcentric to accept the adjudication of a case in which it was never a party. As explained in *Herrlein* and its substantial progeny, the law permits no such result; "As a general rule, 'a court may not enter an injunction against a person who has not been made a party to case before it.'" *National Spiritual Ass'y of Baha'is v. National Spiritual Ass'y of Baha'is*, 547 F.Supp.2d 879, 887 (N.D.Ill. 2008) (discussing similar issues and denying plaintiff's motion to hold non-parties in contempt) (quoting *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1394 (Fed.Cir. 1996)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110, 89 S.Ct. 1562, 1569, 23 L.Ed.2d 129 (1969) (explaining "[i]t is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process.")

c. Plaintiffs Have Offered No Evidence As To The Identity Of The Author(s) Of The Enjoined Statements

Plaintiffs have presupposed a single vital fact—that Mr. Williams and Ms. Ramey actually were the authors who created and posted the material on Ripoff Report which Plaintiffs seek to remove. If the postings at issue were *not* created by Mr. Williams or Ms. Ramey, then it is a factual impossibility to say that Xcentric is acting in concert with those parties by refusing to remove the contested statements.

Plaintiffs have offered no evidence either way on this issue. On the contrary, the declarations submitted by Plaintiffs in support of their Motion for Preliminary Injunction clearly reflect the fact that Plaintiffs have little familiarity with or knowledge of Mr. Williams or Ms. Ramey. Indeed, although Plaintiff David Blockowicz is the father of Megan Williams (who is the ex-wife of Defendant Joseph Williams), Mr. Blockowicz' declaration (Doc. #7) reflects that "I have had little personal contact with Megan over the last several years …."

Mr. Blockowicz did admit that the statements he saw in 2003 appeared to be *true*:

> In or around 2003, I became aware that Mr. Williams and/or his associate, Michelle Ramey, were posting inflammatory statements regarding Megan and her family on the internet, including at sites such as <ripoffreport.com>. <u>While there appeared to be some elements of truth in these statements to the extent they related to Megan</u>, the statements were exaggerated and intended to paint Megan in as negative a light as possible while painting Mr. Williams in as positive a light as possible.

In her declaration, Lisa Blockowicz (Doc. #8) also testified that she learned of the postings on Ripoff Report in 2003 and that "there appeared to be some elements of truth in the statements about Megan … ." Doc. 8 at ¶3. As did Mr. Blockowicz, Ms. Blockowicz claimed to know that every posting was made by Mr. Williams and/or his associated Ms. Ramey. However, neither of these declarations contains any evidence showing that the declarant had personal knowledge of the fact that such postings were actually created by Mr. Williams or Ms. Ramey. *See GW Equity*, 2009 WL 62173, * 11 ("a witness may not testify to a matter unless evidence has been introduced sufficient to support a finding that the witness had personal knowledge of the matter.") (citing Fed. R. Evid. 602). At best, both of these declarations appear to convey the suspicions or personal beliefs of Mr. and Ms. Blockowicz, but absent a showing of the witnesses' personal knowledge, neither are sufficient to establish these facts as true.

Because Xcentric is a non-party, it is not bound by the judgment in this case. Thus, the default of Mr. Williams and Ms. Ramey cannot and does not excuse Plaintiffs from their burden of proving that these individuals are actually the same authors of the three postings at issue. These points clearly show why a full adversary hearing is mandatory here. Plaintiffs cannot unilaterally declare their version of the facts to be true and then impose that declaration on the world because doing so would plainly violate the due process rights of the non-parties; "The central reason that one who is not a party to the action in which the injunction was issued cannot be bound by it is that he has not had his day in court *with respect to the validity of the injunction*. Absent an opportunity to contest liability, his knowledge of the injunction is not sufficient to bind him as an individual … ." *G & C Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 37 (1st Cir. 1980) (emphasis in original).

These concerns are not trivial here. Indeed, Xcentric's records reveal that the three postings at issue and the authors do not appear to be Mr. Williams or Ms. Ramey. According to Ripoff Report's logs, the three postings at issue were made by three different individuals who provided three different names, three different street addresses, and three different email addresses. None of the names used were Defendants'.

It is possible that these names were pseudonyms belonging to Mr. Williams and/or Ms. Ramey. However, it is equally possible that the three names are accurate and that the authors of these posts are individuals who are not related to or working with Defendants. In that case, Plaintiffs have sued and obtained a judgment against the wrong individuals and the injunction against them clearly would not apply to any other thirds parties who were *not* in concert with Mr. Williams or Ms. Ramey.

d. The CDA Precludes Injunctive Relief In This Context

The Communications Decency Act, 47 U.S.C. § 230(c) is a broadly-construed law which provides in pertinent part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." As another judge of this Court just held, the CDA "broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content." *Dart v. Craigslist, Inc.*, 2009 WL 3416106, *4 (N.D.Ill. Oct. 20, 2009) (finding CDA prohibited Cook County Sheriff from obtaining, *inter alia*, injunctive relief against website Craigslist.com for its role in allowing third parties to post ads for prostitution.) As noted in the three federal cases cited above (*Whitney*, *GW Equity*, and *Global Royalties*) the CDA has been uniformly held applicable to Xcentric and RipoffReport.com.

On page 8 of their Motion to Enforce, Plaintiffs devote one single paragraph to the argument that the relief they seek is not precluded by the Communications Decency Act. While conceding that the CDA prohibits them from treating Xcentric as the "publisher" of any of the statements at issue, Plaintiffs nevertheless argue that the CDA does not bar their claim for injunctive relief requiring the removal of material because "Plaintiffs are not attempting to hold Xcentric civilly liable for anything … ." Mot. at 8.

For the same reasons the Sheriff's claim for injunctive relief failed in *Dart*, Plaintiffs' argument is incorrect as a matter of law; "claims for declaratory and injunctive relief are no less causes of action than tort claims for damages, and thus fall squarely within the section 230(e)(3) prohibition." *Katheleen R. v. City of Livermore*, 87 Cal.App.4th 684, 698, 104 Cal.Rptr.2d 772 (Cal.App.4th 2001) (citing authority for premise) (emphasis added). Furthermore, the decision to post material, remove material, and, in some cases, *to refuse to remove material* are all editorial actions which fall squarely within the immunity of the CDA. This exact issue was resolved in Xcentric's favor in *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 2007 WL 2949002, *3 (D.Ariz. 2007) ("*Global Royalties I*")[3] in which the

[3] This earlier ruling is separate from the district court's subsequent opinion in *Global Royalties II*, 544 F.Supp.2d 929 (D.Ariz. 2008).

Arizona District Court held "[Xcentric's] *failure to remove* the three statements was an 'exercise of a publisher's traditional editorial functions' and does not defeat CDA immunity." (emphasis added) (citing *Zeran v. America Online, Inc*., 129 F.3d 327 (4th Cir. 1997)).

e. The Enjoined Statements Were Non-Actionable

If the Court reaches the merits of this case, we note that many of the statements at issue are barred by the statute of limitations. Plaintiffs represented to the Court that Defendants made defamatory statements on Ripoff Report in 2003, and then "updated" or "modified" the posts in 2009. These representations were made for the purpose of avoiding Illinois' one-year statute of limitations for defamation claims. *See* 740 ILCS 165/1 (one year limitation for defamation actions in Illinois).

As explained in the declaration of Ed Magedson submitted herewith, users of the Ripoff Report cannot make any changes to a posting once they have submitted it, nor can they remove their submissions; the system simply does not permit this. *See* Declaration of Ed Magedson ("Magedson Decl.") ¶ 7. In addition, Ripoff Report's server logs for the two postings made in 2003 (Reports 70642 and 69190) reflect that no changes whatsoever have been made to these reports since those dates. *See* Magedson Decl. ¶ 19. The only "updates" have been the addition of non-defamatory responses from other users, many of which question the veracity of the original posting.

Plaintiffs claim that "substantive updating of defamatory comments is precisely the type of activity that avoids the single publication rule." Mot. at 9 (citing *Davis v. Mitan*, 347 B.R. 607, 609–10 (W.D.Ky. 2006). Ignoring the fact that *Davis v. Mitan* interpreted Kentucky rather than Illinois law, the holding in *Davis* clearly explains that: "The mere act of editing a website to add unrelated content does not constitute republication of unrelated defamatory material that is posted on the same website." *Davis*, 347 B.R. at 611 (citing *Firth v. New York*, 98 N.Y.2d 365, 747 N.Y.S.2d 69, 775 N.E.2d 463 (2002)). This is exactly what happened here—the original 2003 were *never* changed; the only "updates" were unrelated comments posted later on which were directed solely at Megan Blockowicz (not a party here) and which did not mention Plaintiffs in any way. Any cause of action based on the original text of the 2003 postings (Reports 70642 and 69190) expired more than 5 years ago; "the first time that an offending item is published, the one-year statute of limitations * * * begins to run and the dissemination of that same offending item thereafter does not give rise to a new cause of action, nor does it refresh the running of the statute of limitations." *Blair v. Nevada Landing Partnership, RBG, LP*, 369 Ill.App.3d 813, 325, 859 N.E.2d 1188, 1194 (Ill.App. 2006).

Because the statute of limitations as to Reports 70642 and 69190 expired in 2004 and this action was not commenced until 2009, there is no question that Plaintiffs' claims as to those statement were time-barred and no relief could have been properly granted as to those reports. Moreover, because "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court …" *Ebay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006), it is crucial to note that Plaintiffs have *admitted* in their declarations that the majority of the text of Reports 70642 and 69190 is true; "there appeared to be some elements of truth in the statements about Megan … ." Doc. 8 (Lisa Blockowicz Decl.) at ¶3.

IV. CONCLUSION

For all of the reasons stated above, this Court should deny Plaintiffs' motion.

DATED this 9th day of November 2009.

XCENTRIC VENTURES, LLC

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